No. 98-57

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

ALBERT D'AURIZIO,

Petitioner,

v.

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Counsel, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA DeBARTOLO, individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, CAROL KILLION, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palisades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party, CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, JAMES NICHOLS, individually and as an officer of the Board of Education, MATTHEW NICHOLS, individually and as a member of the Board of Education, GEORGE FASCIANO, individually and as Superintendent of Board of Education, PETER MAROSE, individually and as a member of Board of Education, and SMITH, DON, ALAMPI & D'ARGENIO, individually and as counsel for the Board of Education,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

This matter involves a discrimination action brought by the plaintiff, Albert D'Aurizio (hereinafter "Plaintiff"), against numerous defendants of diverse affiliations. Specifically, the plaintiff's First Amended Complaint sought relief from all defendants for (1) conspiring to violate the United States Constitution in violation of his First Amendment rights to freedom of association, freedom of speech, freedom to vote, equal protection under the Fourteenth Amendment, procedural due process and substantive due process; (2) violating the United States Constitution in violation of his First Amendment rights of freedom of association, freedom of speech, freedom to vote, equal protection under the Fourteenth Amendment, procedural due process and substantive due process; (3) conspiring to violate 42 U.S.C. Sections 1983 and 1985; (4) violating 42 U.S.C. Sections 1983, 1985 and 1986; (5) violating N.J.S.A. 10:5-1 *et seq.* (Law Against Discrimination); and (6) tortious interference.

Despite the broad allegations by Plaintiff as to a unified conspiracy by the Palisade Park Republicans, there are two distinct events which form the basis for plaintiff's complaints against the Board of Education. The first is whether or not there was any impropriety when the defendant Board eliminated plaintiff's custodial position in June of 1992. The second event is whether or not the defendant Board committed a legally cognizable impropriety when it failed to place plaintiff's name on a part-time custodial list created in or about December 1992.

Because these two events involve different players and different facts, as well as different legal analysis, in the interest of clarity and simplicity they were separately analyzed in the Board's summary judgment motion and by Judge Greenaway in his decision. The very fact that these two Board decisions involved separate players belies plaintiff's allegations that all of the defendants participated in one continuing conspiracy to violate his rights.

The plaintiff was hired by the Board as a custodian in June of 1991 on a part-time basis. Thereafter, in September 1991, he became a full-time employee at a salary of $26,000. At that time, he also had membership in Local 97. In November 1991, the plaintiff ran unsuccessfully for town councilman as an independent, being defeated by Republican party candidates.

In or about January/February 1992, the Board began its annual budget process for the 1992/1993 school year. That process includes the submission of a preliminary budget to the County of Bergen's Superintendent of Schools for approval to advertise the budget in advance of the public hearing as required by the County. At the budget hearing, the issues of increases and decreases are heard and the preliminary budget may be altered. What comes out of the public hearing is a proposed final budget which is then placed on the ballot to be voted on by the people. The 1992/1993 school budget was subsequently defeated by the voters in April 1992.

The specific line item for custodians is Account 610. In the initial budget, line 610 was $505,163. At a public hearing on March 17, 1992, budget cuts were made and

the voters were presented with a line item 610 as $498,163. Following the defeat of the budget, in accordance with standard procedure, the budget was submitted to the Mayor and Council for proposed cuts in the form of a Resolution. The Resolution can either be accepted or rejected by the Board. If accepted by the Board, the cuts would be adopted and implemented. If rejected, the Board must take an appeal. Generally, if the Board could effect the total amount of the proposed cuts in the Resolution without any problem, an appeal would not be taken.

In this case, the Resolution handed down by the Mayor and Council was accepted by the Board and adopted on motion at a regular meeting held June 9, 1992. Among the items adopted by the Board in accordance with the Mayor and Council's Resolution were the elimination of the position of Director of Maintenance, one custodian position and two maintenance positions. The custodian position was eliminated by seniority with the plaintiff's position being the first to be eliminated since he was the most recent hire. Because of an appeal by the maintenance worker, it was later determined that the maintenance workers could "bump" custodians. Thus, three custodians were ultimately laid off.

Another budget document was prepared and was submitted to the County. The County executed that document on June 2, 1992, prior to the alleged June 7th conspiracy meeting reflecting the cuts. Line item 610 was now $335,163. Although not officially adopted until June 9th, the revised budget, with the cuts, were "of record" by May of 1992 and approved by the County on June 2nd,

and thus known before the alleged June 7, 1992 conspiracy meeting. Put another way, there is no way this June 7th meeting was held for the sole purpose of "getting Al" as plaintiff set out to prove. The budget decisions were already made. Plaintiff, unfortunately, was low man on the totem pole and it was known that he was going to be affected by the budget cut.

By way of history, between 1984 and 1995, the budget was passed on only three occasions. For the years 1989-1990, 1990-1991, and 1991-1992, an appeal was taken twice. The Board did not want to go through the cost and litigation associated with another appeal for 1992-1993.

Plaintiff alleged that during the budget process, meetings took place among certain board members amounting to a conspiracy against him. The alleged "hit list" of Ms. Sherwood was nothing more than a budget worksheet. Other names are also contained on it and because of seniority, it was always known that any cuts were going to affect the plaintiff. It is to be further noted that the School Board candidates for April 1992 – Carney, DeBartolo, and Nicholas – openly campaigned on the principle that budget cuts needed to be made and custodial positions eliminated. That these defendants would favor custodial cuts was no secret and was in fact endorsed by the voters when they elected them to the School Board.

A meeting was held on June 7, 1992, at the offices of Rotolo and Rotolo, the Board's counsel. In addition to the defendants who were present at the alleged April meeting, the defendants Albanese, Virginia DeBartolo, Tuscano and Giacobone were present. Plaintiff contended

that the meeting was convened for the specific purpose of eliminating his custodial position.

During this same time period, a vacancy arose on the Board due to a member's resignation. That vacancy was filled by the defendant Valenzuela when he was voted in by the Board on June 9, 1992, at the Board's regular meeting. Immediately after becoming a Board member, the defendant Valenzuela, along with the other Board members, voted to eliminate the Director of Maintenance and two custodial positions pursuant to the Mayor and Council's resolution.

Finally, in or about December 1992, the Board determined the need for the implementation of a part-time custodial list whereby individuals would be called to work on an as-needed basis. Employing a part-time list meant that benefits did not have to be paid and that the number of work hours would be limited to 19 and 1/2. The advice of counsel was sought in connection with preparing this list and a legal opinion was rendered by the Board's counsel regarding the reemployment of laid-off employees.

SUMMARY OF ARGUMENT

The Court below properly found that plaintiff's termination in June of 1992 was due to budgetary constraints and that the Board acted in a justified, legitimate and nondiscriminatory manner. This was based on extensive evidence showing the budgetary problems.

The Board subsequently, in December 1992, hired individuals on an as-needed basis, and created a part-time employment list. Although plaintiff was entitled to be placed on a preferred eligibility list, the failure to place him on a part-time custodial list was not a violation of his civil rights.

The District Court properly deferred to the Magistrate's finding of a political vote privilege with regard to school board elections. The Magistrate was well within his discretion to expand the rules of privilege via analysis of common law precedent, legislative history and constitutional implications.

As the facts and legal analysis of the federal law claims is the same for the state LAD claims, once summary judgment was granted as per the federal law claims the state claims were properly dismissed. As per the pendent jurisdiction doctrine or supplemental jurisdiction, the District Court was entitled not to entertain plaintiff's state law claims once the federal law claims were dismissed.

The Courts below properly exercised their discretion in handling discovery and in not entertaining plaintiff's attempts to file dispositive discovery motions to strike defendants' pleadings.

LEGAL ARGUMENT

POINT I

THE COURT PROPERLY GRANTED SUMMARY JUDGMENT

A. The Court Properly Found Plaintiff Was Terminated For Budgeting Reasons

This case was best summarized by Judge Greenaway in his decision:

> In this case, D'Aurizio contends that he was fired from his custodian position because of his political association. However, D'Aurizio's evidence amounts to no more than conclusory allegations that he spoke to two individuals, one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board. By contrast, the Board defendants provide the Court with ample documentary and testimonial evidence demonstrating that their implementation of the Borough's April 27 Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget. Indeed, the Resolution reflected an overall reduction to the 1992-1993 school budget of $579,000.

As a preliminary matter, Plaintiff has raised some procedural objections to what occurred. He claims a violation of then Local Rule 12G. Plaintiff's Brief, page 17. This is not accurate because while a 12G statement was not originally provided, it was given to the Court before the motions were fully submitted. Db1-9. (References to

"Db" are to the appellee's appendix.) Plaintiff failed to provide these reply papers in his Appendix. It was certainly within the discretion of the Court deciding this motion to move past this procedural situation and deal with the substance of the case. Plaintiff also argues that no exhibits were properly before the Court and therefore there was no competent evidence on which to base a decision. *op. cit.* As Judge Greenaway's opinion reflects, he had overwhelming competent evidence at his disposal. Plaintiff's appendix contains the evidence supplied to the Court with our motion papers. The argument that because these exhibits were supplied with a brief they somehow disappear from the case is specious. The exhibits are documents and deposition testimony, all proper submissions on a summary judgment motion. The motion papers, like an attorney's certification, may not be, in and of themselves, evidentiary. However, they can serve as a proper vehicle to place admissible evidence before the court.

Judge Greenaway's decision, outlined the applicable law. For plaintiff to prove a violation of his First Amendment rights to run as an independent candidate, which is really the crux of his case, he must prove he, as a public employee, was engaged in protected conduct such as maintaining an affiliation with a particular party; and that his political affiliation was a substantial motivating factor in the personnel decision. Furthermore, there is no First Amendment violation if the action taken by the defendants would have been taken even in the absence of the protected activity. *Perez v. Cucci*, 725 F. Supp. 209 (D.N.J. 1989), *aff'd*, 898 F.2d 139 (3d Cir. 1990). Plaintiff must show that his political affiliation was a substantial

or a motivating factor in his discharge. *Laskaris v. Thornburgh*, 733 F.2d 260 (3rd Cir. 1984), *cert. den.*, 469 U.S. 886 (1984). If the plaintiff shows his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274 (1977).

For purposes of this case, the defendant Board had two ways to prevail. First, by showing that the plaintiff has failed to establish a *prima facie* case. *Foster v. Township of Hillside*, 780 F.Supp. 1026, 1042 (D.N.J. 1992). If the Court found the plaintiff had established a *prima facie* case, the defendant Board could still prevail by: (1) offering legitimate, nondiscriminatory reasons for the action; and, (2) showing that the plaintiff could not raise a genuine issue of material fact regarding whether defendants' proffered explanation was pretextual. *Id.* In *St. Mary's Honor Center v. Hicks*, 1135 S.Ct. 2742, 2752 (1993), the United States Supreme Court ruled definitively that a finding that an employer had articulated a pretextual reason for a defendant's actions does not mandate judgment for the plaintiff. Instead, a reason cannot be proved to be a pretext for discrimination unless it is shown both that: (1) the reason was false; and, (2) that discrimination was the real reason. *Id.*

Applying these principles to the facts of this case, Judge Greenaway properly found that the budgetary problems were not a pretext but were shown by ample documentary and testimonial evidence countered by

insufficient allegations by plaintiff. The plaintiff – a public employee – alleges he exercised his right to maintain a political affiliation by running for Town Council on the independent ticket and was entitled to do so without fear of retaliation. For the sake of argument, the plaintiff might meet prongs one and two of the *Perez* test. However, the facts clearly show that plaintiff's political affiliation was not a substantial motivating factor in the decision to eliminate his custodial position. To the contrary, the facts support the defendant Board's position that the plaintiff's job would have been eliminated even if he had not run for Council in November 1991.

The legitimate, nondiscriminatory reason for eliminating plaintiff's custodial position, together with the Director of Maintenance position and other custodial positions, was to implement budget cuts proposed by the Mayor and Council by way of Resolution following the budget's defeat by the voters. The precipitating need for the budget cut was the exercise by the voters of Palisades Park of their Constitutional right to vote on a proposed budget and reject same if they felt it was too high. Various members of the Board, including former member Linda Sherwood, testified that noneducational items were favored to be cut over education items such as a teacher's salary or the like. In this case, it was that very choice that caused plaintiff's job to be sacrificed.

Thus, the plaintiff's unsuccessful bid for Town Council had nothing to do with his custodial position being eliminated. Rather, it was the necessity of cutting the budget and the Board's goal of cutting noneducational expenses first that ultimately resulted in job elimination. In other words, plaintiff – the custodian with the least

seniority – does not have a Constitutional right to a position subsidized by the taxpayers of Palisades Park when the populace expressly voted to cut the school budget. Plaintiff, in his arguments about conspiracies and "hit lists", fails to address that a school budget is paid for by public funds and it is the voters who also have a say in how their tax dollars are allocated.

As early as February 1992, there was a proposed budget cut in the custodian line item. As plaintiff's sister-in-law, Board President Carol Killion testified, as early as February 1992, it was evident that the plaintiff might lose his job because of his low seniority status and the need to bring the budget in for as low as possible. This was prior to the budget being submitted to the people, prior to the alleged conspiracy meetings said to have taken place in April and June of 1992, and prior to the defendant Valenzuela being voted on the Board. In fact, when the budget was submitted to the voters, the plaintiff's salary slot had already been eliminated. That had been based on budget discussions ongoing since December of 1991.

Unlike the standard operating procedure followed by Jersey City in the *Perez* case, above, the record is devoid of any evidence suggesting that the Town of Palisades Park practiced post-election personnel changes. In fact, this is not a case where a new administration "cleans house" and then appoints politically-aligned individuals to fulfill campaign promises. Economic necessity mandated drastic cuts to make an acceptable budget. In order to do that, it was necessary to cut noneducational line items including custodial salaries.

Furthermore, the removal of the plaintiff's job was in line with the stated objective of the defendants Michael DeBartolo, Carney and Nicholas when they ran for the Board in March 1992 prior to any alleged conspiracy meeting and prior to the defendant Valenzuela's appointment to the Board. Part of their platform consisted of eliminating nonessential positions within the school system. Thus, from the outset, prior to any "secret" meetings being held and prior to defendant Valenzuela's appointment, certain defendant Board members had already openly established their goals if elected. The fact that these three candidates were elected indicates that the voters approved of their platform. The voters chose to limit their property taxes at plaintiff's expense. This does not make the plaintiff the victim of a conspiracy. Rather, plaintiff's job was the victim of a taxpayers' revolt. Plaintiff's actual complaint should be directed at each resident of Palisades Park who voted against the budget since they ultimately mandated that plaintiff's position be eliminated.

Additionally, the fact that the defendant Valenzuela was appointed to the Board and then voted in favor of eliminating plaintiff's job is an allegation without substance. First, since it was apparent that plaintiff's job might be eliminated as early as February 1992 and it was a certainty once the budget was voted down and the Mayor and Council mandated cuts, there was no need for the Board to recruit the defendant Valenzuela in the alleged conspiracy as plaintiff suggests. Second, even if the defendant Valenzuela abstained from voting on plaintiff's termination, the motion would still have passed since only two members voted "nay" and one abstained.

There still would have been enough affirmative votes to pass the motion without Valenzuela.

Finally, in support of the defendant Board's position is the fact that the Mayor and Council's resolution, which included the elimination of plaintiff's job and the necessary changes to the budget, were forwarded to the Board of Education, to the County Superintendent of Schools, to the New Jersey Department of Education and to the Chief Financial Officer of the Borough of Palisades Park in addition to being posted on the bulletin board in Borough Hall before any alleged conspiracy meeting of June 7, 1992. The elimination of plaintiff's job became public knowledge in May 1992. The defendants hardly needed to have a "secret" conspiracy meeting in June to implement a plan of action mandated by the voters in the April election, required by the Mayor and Council resolution after the election, and reported to various public entities, including the Bergen County Superintendent of Schools, by the end of May.

While plaintiff, for the sake of argument, may have met his initial burden, the above facts sufficiently demonstrate that the defendant Board met its burden of showing that the elimination of plaintiff's position was due to budgetary constraints and that the defendant Board was more than justified in taking such action. Therefore, the defendant Board legitimately and nondiscriminatorily eliminated plaintiff's position and, as such, did not violate his First Amendment and/or his civil rights in doing same, and Judge Greenaway's decision on this point should be affirmed.

B. The Failure To Place Plaintiff's Name On The Part-Time Custodial List Did Not Constitute A Violation Of His Civil Rights

Plaintiff also contended that following the elimination of his custodial position, the defendant Board discriminated against him by failing to place his name on the part-time custodial list created in December 1992. He alleged that the omission of his name from the custodial roster was a deliberate act of retaliation arising out of the November 1991 election. A close review of the facts, however, demonstrated that the plaintiff's claim is without merit.

The part-time custodial list was created in December 1992, approximately six months after the plaintiff's position was eliminated by the Board due to budget constraints. It was determined that additional custodial help was needed, but the Board did not want full-time employees. The utilization of part-time personnel behooved the school district financially because, among other things, benefits did not have to be paid and the number of work hours was limited to 19 and 1/2. Full-time employees, on the other hand, received benefits and could work an unlimited number of overtime hours. Additionally, the part-time custodians would only be called on an as-needed basis, generally in emergent situations or if unexpected problems arose. The fact that the defendant Board ultimately expended more money on the part-time employees is of no consequence. Clearly, the defendant Board had no way of knowing the cost to them when the part-time list was first implemented. In fact, the list was created with continued cost-cutting as the objective. What they had not counted on were the unforeseen

circumstances that arose the following winter which required an exorbitant amount of help.

Unlike the First Amendment argument raised in Point I(A) above, the plaintiff is unable to make even a semblance of a showing that he has been deprived of a Constitutionally-protected right or property interest. Initially, for plaintiff to sustain his cause of action, it must be determined that a liberty or property interest exists entitling him to due process protection. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 560, 569. Property interests are not created by the Constitution but rather are created and defined "by existing rules or understandings which stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents*, 408 U. S. at 577. A property interest in continuing public employment can be created either by statute or contract where the public employer is barred from terminating or not renewing the employment relationship without cause. *See Cleveland Bd. of Ed. v. Laudermill*, 470 U.S. 532 (1985); *Bishop v. Wood*, 426 U.S. 341 (1976).

N.J.S.A. 18A:17-3 states:

> Every public school janitor . . . shall, unless he is appointed for a fixed term, hold his . . . employment under tenure during good behavior . . . and shall not be dismissed . . . , *except as the result of the reduction of number of janitors* . . . except for neglect, misbehavior or other offense. . . .

(emphasis added).

Furthermore, *N.J.S.A.* 18A:17-4 states:

> No Board of Education shall reduce the number of janitors . . . by reason of . . . political affiliation and when any janitor . . . is dismissed by reason of reduction in the number of such employees the one having the least number of years to his credit shall be dismissed in preference . . . and the person so dismissed shall be and remain a part of a preferred eligibility list, in the order of years of service for reemployment whenever vacancies occur. . . .

In reviewing the above statute, it is clear that the defendant Board complied with all of its requirements. First, the plaintiff's position was eliminated due to a reduction in the number of janitors. Second, the plaintiff specifically was dismissed pursuant to a seniority system. Additionally, although the statute requires dismissed janitors to be placed on a preferred eligibility list, a plain reading of the statute cannot be interpreted to require placement of a dismissed janitor upon a part-time custodial list. No full-time janitors were hired in plaintiff's stead and, within two years, all custodial positions were eliminated and the work was given to outside contractors.

Specifically, the placement of a dismissed janitor on a preferred eligibility list concerns the reemployment of that janitor in the event a vacancy occurs. In this instance, there was no reemployment but, rather, individuals called in on an as-needed, temporary basis. Furthermore, individuals were not called in because of a vacancy but because of necessity.

Moreover, the exclusion of plaintiff's name from the part-time list was not a hasty and arbitrary act of the

defendant Board. To the contrary, the Board sought the advice of its counsel when confronted with the reemployment rights of laid off custodians. The Board's counsel, in a legal memo, opined that the defendant Board had no statutory obligation to include plaintiff on the list. In fact, the Board's counsel recognized that Article V(B)(6) of the collective bargaining agreement with Teamsters Local 97, of which plaintiff was member, the Board retained the right to contract for such needed services as it determines. Consequently, the defendant Board, in reasonable reliance upon the advice of counsel, was confident that plaintiff's exclusion from the list did not in any way violate his rights.

In conclusion, there is no nexus between the November 1991 election and the failure to place plaintiff's name on the part-time list and, therefore, no First Amendment violation. Additionally, there is no entitlement to the placement of plaintiff's name on the part-time list, only an entitlement to be placed on a preferred eligibility list, which list is clearly distinguishable from the part-time list. The defendant Board reasonably relied upon the advice of counsel when considering the reemployment rights of laid off employees and acted accordingly. Finally, plaintiff has failed to show that the failure to place his name on the part-time list is causally connected to a Constitutionally-protected reason. Once again it is respectfully requested that this Honorable Court affirm Judge Greenaway on this point.

POINT II

THE DISTRICT COURT PROPERLY DEFERRED TO THE MAGISTRATE'S FINDING THAT A POLITICAL VOTE PRIVILEGE DOES EXIST FOR SCHOOL BOARD ELECTIONS

Plaintiff's counsel was seeking to invade the sanctity of the voting booth and force a witness to reveal, in public, for whom she secretly voted. Specifically, non-party witness Susan Spohn refused to answer plaintiff's deposition questions regarding her voting record in school elections as well as in general elections. The political vote privilege is specifically intended to avoid this situation in that it assures voter secrecy which insures both free and fair elections. Non-recognition of this would put at risk an essential element of American Democracy. Despite the public's "right to every man's evidence – the need to protect voter secrecy is sufficiently – and overwhelmingly – important to outweigh that principle." (cited by the Magistrate at 899 F. Supp. at 1360-61)

The fact that individuals are politicians does not mean that they are any less entitled to have the secrecy of their votes protected. By being a politician, a person does not waive his rights and privileges as a private citizen when acting as a private citizen. Furthermore, politicians need the secrecy of the vote more than any other person. Politicians would be the ones most subject to political retaliation, by members of their own party, if they did not, in the secrecy of the voting booth, vote for their own party. The whole purpose of the secret ballot is so that people can vote their conscience. This right would be severely violated if plaintiff's arguments are accepted.

In *William T. Thompson Company v. General Nutrition Corp.*, 671 F.2d 100, 103-104 (3rd Cir. 1982) (cited by the Magistrate at 899 F. Supp. 1353-54) in Federal question cases, the Federal Common Law privileges apply. Where there are Federal claims in the case also presenting State Law claims, the Federal Rule favoring admissibility, rather than any State Law privilege, controls. However, this holding does not preclude resort to State Law analogies for the development of the Federal Common Law of privileges in instances where the Federal Rule is unsettled. Contrary to plaintiff's argument, the Federal Law is not settled on this issue. Furthermore, resort to the State Law was completely appropriate. There are no Federal statutes on Federal elections because they appear to defer to applicable State Law. For example, the procedure for Congressional elections is set forth in 2 U.S.C. § 9. This specifically grants to the States the right to control voting procedures. The Fourth Circuit held in *Smith v. Blackwell*, 115 F.2d 186 (4th Cir. 1940), that Federal elections would be a matter of State Law. State Law in New Jersey makes votes secret and, further, makes it a misdemeanor to violate the secrecy provisions. N.J.S.A. 19:15-26. As Federal elections defer to State Law in how they are conducted, it is appropriate for the Federal Common Law concerning privileges arising out of these very same elections to also defer to State Law.

The District Court reviewed the Magistrate's analysis and reasoning behind his decision to find Ms. Spohn had a political vote privilege and therefore she did not have to answer plaintiff's questions relating to her voting record in certain elections. The District Court determined that the Magistrate analyzed Rule 501 of the Federal

Rules of Evidence and reference to Third Circuit precedent; namely, *Thompson, supra*. The District Court noted that federal courts are wary to expand or treat liberally the concept of common law privilege. But on a case-by-case basis, the courts have flexibility to develop rules of privilege as are necessary. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990); *Trammel v. U.S.*, 445 U.S. 40 (1980); *In re Grand Jury Investigation (appeal of United States)*, 918 F.2d 374, 378-79 (3d Cir. 1990). And, it was determined that the Magistrate analyzed Rule 501 and properly considered the existence of a privilege in this case; that the Magistrate did not adopt the New Jersey Rules of privilege in making this decision; and that the Magistrate analyzed the asserted privilege in light of relevant common law precedent, legislative history and constitutional implications. (See Letter opinion dated May 15, 1996.) Taking all of this analysis into account, the Magistrate came to a conclusion "in light of reason and experience." *Fed.R.Evid.* 501. Thus, the decision of the District Court to defer to the Magistrate's finding of a political vote privilege was proper.

POINT III

SINCE PLAINTIFF'S FEDERAL CLAIMS WERE DISMISSED, THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S STATE LAW CLAIMS UNDER THE PENDENT JURISDICTION DOCTRINE

The District Court decided not to retain jurisdiction of plaintiff's state law claims under the pendent jurisdiction doctrine. The pendent jurisdiction doctrine has not

become bad law, but was modified to confer supplemental jurisdiction on the courts. Whether under the original "pendent jurisdiction doctrine" or the "supplemental jurisdiction doctrine" the district court had the discretion not to retain this matter for the resolution of state law claims.

As per U.S.C.A. Section 1367(c), "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction. . . . In exercising its discretion, the district court should take into account principles of judicial economy, convenience, and fairness to the litigants. *Stehney v. Perry*, 907 F. Supp. 806 (D.N.J. 1995) [citing *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277 (3d Cir. 1993)]. The decision to retain or decline jurisdiction requires a case specific analysis. Indeed, in amending the statute, Congress deemed the courts "may" decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it had original jurisdiction. Thus, broad discretion was provided in making such a determination. Although a district court could retain supplemental jurisdiction over state claims following dismissal of federal claims, the better practice is to dismiss the state claims. *Wegbreit v. Marley Orchards Corp.*, 793 F. Supp. 957 (E.D. Washington 1991).

In the instant matter, the district court dismissed the state law claims by citing to *Tully v. Mott Supermarkets, Inc.*, 540 F. 2d 187 (3d Cir. 1976). Specifically, the court stated it cannot exercise pendent jurisdiction in the absence of a federal claim to confer subject matter jurisdiction. Although pendent jurisdiction has been modified

to incorporate supplemental jurisdiction, the court is still provided with the option of declining retention of state law claims. See U.S.C.A. Section 1367(c).

Whereas numerous cases have illustrated the court's option to retain cases under this doctrine, numerous cases also illustrate the option not to exercise supplemental jurisdiction. In *Shabat v. Blue Cross Blue Shield of the Rochester Area*, 925 F. Supp. 977 (W.D.N.Y. 1996), the judge dismissed plaintiff's federal claims and stated "I decline to exercise jurisdiction over his claim under the New York Human Rights Law." That case further recognizes that "it is well settled that 'if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.' "

In *Johnson v. Cullen*, 925 F. Supp. 244 (D. Del. 1996) the court dismissed all federal claims and stated, "Congress has granted the district courts discretion to decline to exercise jurisdiction over non-federal claims over which the court may have had supplemental jurisdiction under [U.S.C.A. 1367] section (a)." The court went on to note:

> Moreover, a federal court should avoid needless decisions of state law both as a matter of comity and to promote justice between the parties. If the federal claims are dismissed prior to trial, even though not insubstantial in a jurisdictional sense, the non-federal claims should be likewise dismissed.

(citing *Borough of West Miflin v. Lancaster*, 45 F.3d 780 (3d Cir. 1995) citing *United Mine Workers*, 383 U.S. at 726-27).

Also, in *Redlich v. Albany Law School of Union University*, 899 F. Supp. 100 (N.D.N.Y. 1995), the court dismissed all pending federal claims and deemed the only remaining issues involved alleged violations of state law. The court decided:

> The relevant exception to the exercise of supplemental jurisdiction in this case is that this court "has dismissed all claims over which it has original jurisdiction." Thus, since all federal claims have been dismissed, this court declines to exercise supplemental jurisdiction over the remaining state law claims, and dismisses those claims, without reaching the merits, for lack of subject matter jurisdiction.

Although plaintiff relies on *Timm v. Mead Corp.*, 32 F.3d 273 (7th Cir. 1994) for the principle that the district court has authority to retain jurisdiction over state law claims, it is also a well-settled principle that the district court has discretion to decline such jurisdiction. The court's discretionary approach includes judicial economy, convenience, fairness and comity. Thus, district court's determination whether or not to exercise jurisdiction, that decision, being discretionary, should not be disturbed. *Id.* at 277. In the instant matter, the court used its discretion and decided not to exercise supplemental jurisdiction as permitted by statute. Thus, this decision should not be disturbed.



CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court decline to issue a Writ of Certiorari to the Court of Appeals for the Third Circuit in this matter and not reverse the dismissal below.

Respectfully submitted,

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JOHN METHFESSEL, JR.
Attorney for Respondent, Board of Education and its members in their official capacity

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August 29, 1996

William T. Walsh, Clerk
United States District Court for
the District of New Jersey
Dr. Martin Luther King Courthouse
50 Walnut Street
Newark, NJ 07101

Re: D'AURIZIO, ALBERT v. BOROUGH OF PALISADES PARK
Our File No.: D 37404 DLC
Docket No. : 93-4417 (NHP)

Dear Mr. Walsh:

Kindly accept the following letter brief in lieu of a more formal brief in reply to the plaintiff's opposition to the defendant Board of Education's (hereinafter the "Board") motion for summary judgment which is returnable before the Honorable Nicholas Politan on September 23, 1996.

First, in response to the plaintiff's opposition, enclosed is the Board's Rule 12G Statement of Undisputed Facts which was inadvertently excluded from the moving papers. We apologize for any inconvenience this may have caused counsel and/or the Court and respectfully

request that the Board's motion *not* be denied on those grounds.

Second, although the plaintiff's opposition speaks to "all defendants'" dispositive motions, this reply will address only those arguments raised in opposition to the *Board's* summary judgment motion.

THE ELIMINATION OF PLAINTIFF'S POSITION

The plaintiff's opposition to the Board's motion for summary judgment is captioned, "Board's confusion with the budget." To the contrary, it is plaintiff's counsel who is confused with the budget process. Although the process is explained at length in the Board's moving papers, as well as in the moving papers of defendants Borough of Palisades Park, Albanese and Maresca, it appears necessary to clarify certain points.

Because the budget was defeated by the voters of Palisades Park, cuts in the budget were mandated. Even as early as February 1992, as evidenced by Exhibit B to the Board's moving brief, the plaintiff's job was in jeopardy. This was *prior* to the "trio" running for election, *prior* to the Mayor and Council's resolution, *prior* to any "conspiracy" meetings, and *prior* to the appointment of the defendant Valenzuela to the Board.

Contrary to the plaintiff's assertion, the worksheet prepared by Linda Sherwood was not a prefabricated "hit list" but, rather, was part and parcel of the extensive budget process. The plaintiff makes much ado about his name appearing in print on the worksheet. However, because of the seniority system, the plaintiff's job was to

be eliminated no matter how it was referenced in the worksheet. The plaintiff's name was not the only one to specifically appear on the worksheet. Other job cuts were referenced by name. (See Exhibit B to Board's moving brief).

With regard to the Mayor and Council's Resolution, the plaintiff argues that because of a surplus, the plaintiff's job did not have to be cut. Clearly, it is the plaintiff who is confused about the budget. The plaintiff misinterprets the purpose of the cuts which were *not* made because there was not enough money. They were necessitated by the defeat of the budget by the voters and were implemented to ease the taxpayers' burden and to overcome prior financial problems without jeopardizing the students' education. (See Exhibit D to the Board's moving brief).

The Resolution itself shows that an overall reduction in the budget of $579,000 was needed. (See Exhibit D to the Board's moving brief). The surplus plaintiff refers to was specifically allocated for unexpected circumstances. (See Exhibit D to the Board's moving brief). It was not intended to take up slack and pay for dispensable positions such as plaintiff's. In fact, as the Resolution shows, a $100,000 cut was made to the surplus allotment as well. (See Exhibit D to the Board's moving brief).

The plaintiff was not the only Borough employee to be laid off in June 1992. In addition to the custodial cuts, two secretarial positions were to be eliminated. (See Exhibit D to the Board's moving brief). More important, the cuts in account 610 (custodial and maintenance) were part of an

overall move to revamp the existing custodial and maintenance program, *not* a scheme to retaliate against the plaintiff for his bid for town council. (See Exhibit D to the Board's moving brief). In fact, the Board ultimately fulfilled that desire by hiring an outside custodial service to perform the function of the entire custodial/maintenance staff. Such outside service exists to this day.

In further support of the Board's position, the cutting of the custodial positions ($163,000) and the secretarial positions ($171,000) accounted for the two largest cuts proposed by the Mayor and Council in its Resolution. (See Exhibit D to the Board's moving brief.) The most drastic cuts, then, were made to noneducational items, exactly in line with the Board's objective to preserve education. (See Exhibit B to Board's moving brief).

Assuming, *arguendo,* that the plaintiff's bid for town council played a role in his layoff, no constitutional violation occurred since the cuts in noneducational items, including the elimination of jobs based on seniority, would have been made anyway since it was the Board's continuing objective. Logically, it was the voters' defeat of the budget that prompted plaintiff's termination, a vote which had absolutely nothing to do with the plaintiff's run for election.

Thus, for plaintiff to prevail, the Court must accept as true that the entire voting population, together with all defendants, conspired to retaliate against the plaintiff. Even if there were mixed motives for eliminating plaintiff's position, the Board is still entitled to summary judgment since it would have made the same decision had the plaintiff not participated in the 1991 election. *See Mt.*

Healthy City Schools District Bd. of Ed. v. Doyle, 429 U.S. 274 (1977).

THE FAILURE TO PLACE PLAINTIFF'S NAME ON THE PART-TIME LIST

Notwithstanding the above, the plaintiff argues that the failure of the Board to place plaintiff's name on the part-time list shows pretext. However, as set forth in the Board's moving papers, the Board did not fail to rehire plaintiff as required by the collective bargaining agreement or by the Board's own policy. To reiterate, *no* vacancies occurred following the plaintiff's termination. The part-time list was simply implemented to further reduce costs. (See Exhibit G to the Board's moving brief). The procedure permitted individuals to be called to work on an as-needed basis with limited hours of work and no benefits. (See Exhibit G to the Board's moving brief).

The failure to place the plaintiff's name on that list was not a random act. In fact, the Board sought the advice of its counsel which was memorialized in an opinion dated December 7, 1992, annexed to the Board's moving brief as Exhibit H. That issue is discussed at length in Point II of the Board's brief.

For clarification purposes, however, the Board did not advance the reliance argument to "pass the buck" as suggested by plaintiff, and does not contradict the argument raised by the Board's counsel in its papers. The argument was advanced to show that the defendant Board complied with all of the statutory requirements, that the Board did not violate the plaintiff's constitutional

rights, and that the Board did not perform a hasty or arbitrary act.

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Finally, as for the plaintiff's procedural and substantive due process arguments, the Board relies upon the arguments raised in its opposition to the plaintiff's motion for partial summary judgment previously served on all counsel and filed with the Court.

CONCLUSION

The above facts support the Board's position that the voters' rejection of the budget was the substantial and motivating factor in the elimination of plaintiff's position. As such, the Board has met its burden in providing a legitimate, nondiscriminatory reason for its actions. In contrast, the plaintiff has failed to raise a genuine issue of material fact that the Board's actions were a pretext to discrimination against the plaintiff.

Based on the arguments raised in the Board's moving brief, it is respectfully requested that summary judgment be granted in its entirety.

Respectfully submitted,

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Enc Rule 12G Statement in Support of Motion for Summary Judgment Certificate of Service

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Our File No.: D-37404-DLC

ALBERT D'AURIZIO

Plaintiff(s)

VS.

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Council, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA

Hon. Nicholas Politan

DOCKET NO.:
93-4417 (NHP)

CIVIL ACTION

DEFENDANT BOARD OF EDUCATION'S RULE 12G STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DeBARTOLO individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palesades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party, CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, and JAMES NICHOLS, individually and as an officer of the Board of Education

Defendants.

---

1. The 1992/1993 budget was defeated by the voters of Palisades Park in April 1992. (See **Exhibit D** to the Board's moving brief).

2. At a budget hearing held March 17, 1992, budget cuts were made. (See **Exhibit L** to the Board's moving brief).

3. Following the defeat of the budget, in accordance with the budget process, the budget was submitted to the

Mayor and Council for proposed cuts in the form of a Resolution. (See **Exhibit B** to the Board's moving brief).

4. The Board of Education accepted the Mayor and Council's Resolution and adopted same on motion at a regular meeting held June 9, 1992. (See **Exhibit D** to the Board's moving brief).

5. The Resolution of the Mayor and Council included the elimination of the Director of Maintenance position, one custodial position, and two maintenance positions. (See **Exhibit D** to the Board's moving brief).

6. The plaintiff, at the time of the cuts, was the most recent hire and was thus laid off. (See **Exhibit B,** P107 L17-18 of the Board's moving brief.)

7. On June 2, 1992, the County of Bergen executed a budget document reflecting cuts. (See **Exhibit M** to the Board's moving brief).

8. April 1992 School Board candidates, Carney, DeBartolo and Nicholas, campaigned on the principle that budget cuts needed to be made and custodial positions eliminated. (See **Exhibit I** to the Board's moving brief).

9. At the June 9, 1992, meeting, two members of the Board voted "nay" and one member abstained on the vote to eliminate the plaintiff's position. (See **Exhibit E** to the Board's moving brief).

10. In or about December 1992, the Board determined a need to implement a part-time custodial list. (See **Exhibit F,** P173 L5 to the Board's moving brief).

11. Individuals on the part-time list received no benefits, were called in an an as-needed basis and worked only 19 and 1/2 hours per week. (See **Exhibit B** P124 L6-10 and **Exhibit G,** P182 L16-25, P183 L1-2 of the Board's moving brief).

12. The Board's counsel rendered a legal opinion in the form of a memo dated December 7, 1992, regarding the re-employment of laid-off employees. (See **Exhibit H** to the Board's moving brief).

13. As early as February 1992, there was a proposed budget cut in the custodian line item. (See **Exhibit B,** P523 L17-211.

14. The plaintiff's salary slot was eliminated when the budget was submitted to the voters. (See **Exhibit B,** P676 L7-17 to the Board's moving brief.)

15. The Mayor and Council's Resolution was submitted to the Board of Education, the County Superintendent of Schools, the New Jersey Department of Education and the Chief Financial Officer of the Borough of Palisades Parks and was posted on the bulletin board in Borough Hall before June 7, 1992. (See **Exhibit B,** 628 L19-25; P629 L1-23 to the Board's moving brief.)

WHEREFORE, the defendant Board of Education respectfully requests that its motion for summary judgment be granted in its entirety.

METHFESSEL & WERBEL, ESQS.
Attorneys for Defendant Board
of Education

By /s/ Donald L. Crowley
Donald L. Crowley, Esq.-2586

Dated: August 28, 1996